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No. 324

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

DAYTON RUBBER COMPANY, *Petitioner*

v.

GOODMAN ASSOCIATES, INCORPORATED

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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INDEX

CASES:	Page
Commissioner v. Duberstein, —— U.S. —— (decided June 13, 1960)	2, 3
Commissioner v. Spermaceti Whaling & Shipping Co., —— F. 2d —— (decided August 10, 1960)	1, 2
Graver Tank Co. v. Linde Air Products Co., 339 U.S. 605	3
McAllister v. United States, 348 U.S. 19	3
United States v. United States Gypsum Co., 333 U.S. 364	3

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CORDOVAN ASSOCIATES, INCORPORATED

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

While there are many statements in respondent's brief in opposition to the petition for certiorari to which we take exception, we propose to limit this reply to comment on the very recent decision of the Sixth Circuit in *Commissioner* v. *Spermacet Whaling & Shipping Co.*, S/A— F. 2d —, (August 10, 1960) (See Resp. Apdx. pp. 1b-19b), which respondent has brought to this Court's attention.

The sole question raised in Dayton's petition for certiorari was whether or not the Court of Appeals for the Sixth Circuit erred in failing to apply the "clearly erroneous" test of Rule 52 to a critical finding of the

District Court. Stated more explicitly, the question presented was whether the court below erred when it held that the finding in question was "actually an inference or conclusion drawn from the facts with which" the court was "free to disagree" without regard to or, as the court said, "uninhibited by the 'clearly erroneous' test of Rule 52. . . ." (Pet. Apdx. p. 15a)

The opinion in the instant case was handed down by the Sixth Circuit on June 6, 1960. On June 13, 1960, this Court rendered its decision in *Commissioner* v. *Duberstein*, — U.S. —, and, in the course of that decision, reiterated its position as to the application of the clearly erroneous test and particularly its application to inferences.

Respondent, in its brief in opposition, points out (Resp. Br. pp. 10-11) that on August 10, 1960, the Court of Appeals for the Sixth Circuit decided *Commissioner* v. *Spermacet Whaling & Shipping Co.*, S/A, (— F. 2d —) (see Resp. Apdx. pp. 1b-19b) and that "[i]n the course of that opinion, Judge Miller took explicit note of the alleged conflict of which petitioner complains. He [Judge Miller] then cited and quoted from the opinion of this Court in the *Duberstein* case that 'factual inferences from undisputed basic facts' receive the protection of Rule 52(a), F.R. Civ. P. Judge Miller recognized the *Duberstein* decision as settling any conflict concerning factual inferences, whether they be ultimate facts or not, drawn by a trial court from undisputed basic or evidentiary facts." (See Resp. Apdx. 6b-8b)

In view of this recent decision, respondent argues that "[i]t thus appears that the *Duberstein* case is hav-

ing exactly the effect in the Sixth Circuit petitioner claims it should have . . ." Consequently, respondent believes that "there is no need for this Court to reiterate its stand again, twice within the same six-month period, on the same issue . . ." (Resp. Br. p. 11)

In response to respondent's argument, we would point out that while the *Duberstein* decision may have had the effect in the Sixth Circuit that respondent claims, this does not gainsay the fact that in the instant case the Sixth Circuit did not follow applicable principles of law. The mere fact it recognized those principles, on August 10, 1960, furnishes no reason why this petitioner should not be accorded a review in accordance with the applicable principles which had been previously announced by this Court in several important cases, including *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 395; *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Co.*, 336 U.S. 271, 275-276; and *McAllister* v. *United States*, 348 U.S. 19, 20.

Respondent speculates that the result in this case would be the same whether the Court of Appeals applied the clearly erroneous test or not (Resp. Br. pp. 15-17) and intimates that it actually held the finding in question to be clearly erroneous without using those exact words. We disagree because, in this particular case, the Court of Appeals specifically and explicitly stated that it was not applying the clearly erroneous test to the critical finding in question. We respectfully submit that in this regard the Court below committed error and that the case should be remanded so

that the critical finding of the District Judge may be tested in accordance with applicable principles.

Respectfully submitted,

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